UNITED STATES
v.
BRUCE L. GILLETTE ET AL.

IBLA 86-328 Decided September 13, 1988

Appeal from a decision of Administrative Law Judge John R. Rampton, declaring the LD #1 lode mining claim invalid for lack of discovery of a valuable mineral on the claim. A-19314.

Affirmed.

1. Evidence: Prima Facie Case -- Mining Claims: Contests

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government mineral examiner testifies that he has examined a mining claim, and, based upon his examination, concludes the quantity and quality of the minerals is insufficient to support a finding of discovery, a prima facie case is established.

2. Mining Claims: Discovery: Generally

Evidence of the existence of mineralization which may encourage further exploration to determine the existence of minerals of such quality and quantity as would justify the expenditure of funds for the development of a mine does not establish the discovery of a valuable mineral deposit.

3. Mining Claims: Discovery: Generally

Isolated showings of high gold values are not sufficient by themselves to establish the discovery of a valuable mineral deposit.

APPEARANCES: Bruce L. Gillette, Apache Junction, Arizona; Warren A. Konemann and Patricia S. Konemann, Mesa, Arizona, pro sese; John W. Zavitz, Esq., Albuquerque, New Mexico, for the United States Department of Agriculture.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Bruce L. Gillette, Warren A. Konemann, and Patricia S. Konemann have appealed from a decision dated December 5, 1985, by Administrative Law Judge John R. Rampton, Jr., declaring their LD #1 lode mining claim, AMC 105407, situated in the SW 1/4, sec. 22, and the SE 1/4, sec. 23, T. 2 N., R. 9 E., Gila and Salt River Meridian, Maricopa County, Arizona, void for lack of discovery of a valuable mineral deposit on the claim.

The claim was located on June 1, 1980, and includes approximately 20 acres in the Tonto National Forest, within the Superstition Wilderness area. These lands were withdrawn from mineral entry on January 1, 1984, by section (3)(a) of the Wilderness Act of 1964, 16 U.S.C. § 1132(a) (1982).

At the request of the United States Forest Service (FS), the Arizona State Office, Bureau of Land Management (BLM), initiated a mining claim contest by issuing a complaint on August 2, 1984. The complaint charged that there "are not presently disclosed within the boundaries of the mining claim nor were there disclosed as of December 31, 1983, minerals of a variety subject to the mining laws, sufficient in quantity, quality and value to constitute a discovery." Contestees (appellants herein) filed an answer and a hearing was held before Judge Rampton in Phoenix, Arizona, on January 16, 1985.

FS Geologist Hilton K. Cass testified that he examined the claim on January 30, 1984, and found one working, a decline drift (Tr. 26, 30). He selected sampling sites in consultation with appellants and gathered four samples. The samples were bagged, sealed, and sent to the Arizona Testing Laboratories in Phoenix for sample preparation and atomic absorption assay for gold and silver (Tr. 32-34). The assays were performed by Claude E. McLean, Jr., registered chemical engineer and assayer. McLean testified that the atomic absorption method is accepted by the industry as a valid process for determining gold and silver content of ores (Tr. 229). McLean's assays showed nil values for gold and trace values for silver for all four samples (Exh. 7). With respect to atomic absorption, McLean testified that for gold, "trace" meant a reading of at least 0.001 ounce/ton, and "nil" meant less than 0.001. For silver, trace is a reading 0.01 to 0.05 oz./ton (Tr. 240-41). 1/

Cass also had fire assays performed by Silver Systems, Inc., of Phoenix, Arizona. These assays revealed nil values for gold and silver for three of the samples, and a trace for gold and nil value for silver for the remaining sample (Tr. 37; Exh. 8). Cass testified that in December 1983 the average price for gold was $ 388.34 per ounce and in 1985 (at the time of the hearing) the price was about $ 304 per ounce (Tr. 248). Referring to an Arizona Bureau of Mines publication (Guide for Small Mines and Prospectors),

1/ McLean testified: "If we get less than .001 we say there's no gold there * * * if we say trace, we got something between nothing and .01. So it is less than one hundredth of an ounce per ton" (Tr. 240).

Cass stated he had projected the costs of mining operations for appellants' claim between $ 50 and $ 60 per ton just to extract the ore (Tr. 218). He testified that appellants' ore would have to be milled by a flotation process such as employed by Phelps Dodge, of Douglas, Arizona. Phelps Dodge would deduct 0.02 oz./ton gold and one 1 oz./ton silver as their fees for milling the ore (Tr. 221). Cass concluded that the material on the claim could not be extracted, removed, and marketed at a profit because the values shown by the assays would equate to only a few dollars per ton for gold and a few cents per ton for silver (Tr. 38).

Bruce Gillette testified that he and Warren Konemann collected two 3-pound samples within 10 feet of where Cass had collected samples (Tr. 63-65). These samples were also sent to the Arizona Testing Laboratories for analysis. Both samples assayed nil for gold and trace for silver (Exh. MC-A). 2/ Gillette and Konemann sent other samples to Metal Refiners, Ltd., of Mesa, Arizona (Tr. 68-69). Testifying with reference to Exhibit MC-B, one of the assay reports, Gillette explained that Metal Refiners, Ltd., had fire assayed a 60-gram sample and obtained values of 4.5 oz./ton for gold and 0.5 oz./ton for silver. A further report from Metal Refiners, Ltd., lists a fire assay value of 198 oz./ton combined metals, and atomic absorption results of 1.1 oz./ton for gold and 155 oz./ton for silver (Exh. MC-E). In an affidavit of April 26, 1985, Cass characterized these results as self-contradictory and arithmetically erroneous. He stated:

> [Exh. MC-E] reports 198 troy ounces per ton for combined metals for a fire assay bead. The combined metals in a fire assay bead should be the precious metals if the assay was performed properly. However, the atomic absorption assay of that bead shows a total of 156.1 troy ounces per ton for gold and silver (1.1 oz./ton Au plus 155 oz./ton Ag). The difference is not explained. Also, the calculation of 1.1 oz./ton gold is arithmetically incorrect. The instrument reading for gold is reported as 2.16 ppm (parts per million). Parts per million are converted to troy ounces per ton by the equation
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> ppm x 0.0292 = troy oz./ton
>
> Therefore, 2.16 ppm x 0.0292 = 0.06 troy oz./ton. This figure should be divided in half since a double assay-ton weight was used for the test (58.332 versus 29.166 grams per assay ton), yielding a calculated assay of 0.03 troy oz./ton, not 1.1 troy oz./ton.
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> After considering this ostensibly bona fide assay report by Metal Refiners, Ltd, it is my opinion that it is too flawed and confusing to be given much value and it reflects a questionable degree of expertise and poor procedure on the part of the assayer.
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> 4. The value reported on the assay certificate of August 5, 1980 [Exh. MC-B], from Metal Refiners * * * is not even remotely comparable to the values reported from the same laboratory on Contestees' Exhibit [MC-E], although they are purportedly assays

2/ These assays were also performed by Claude E. McLean, Jr.

> of the same material. The 5.0 troy ounces of combined gold and silver reported on Exhibit [MC-B] is radically different from the 198 troy ounces (or 156.1 troy ounces by atomic absorption) reported on Exhibit [MC-E]. Such erratic results suggest to me a flawed sampling or assaying procedure, or both. It has been my experience with reputable assayers that they will re-run assays when results are widely disparate in order to check for possible contamination and to check their analytical procedure. Consequently, without a third or umpire assay there is, in my opinion little assurance that either certificate is acceptable as an accurate assay report.

(Cass Affidavit at PP 3, 4).

Gillette testified that samples were also sent to Grand Junction Laboratories, Grand Junction, Colorado, which performed spectrochemical analysis, reporting values of 0.001 oz./ton for gold and 0.26 oz./ton for silver (Exh. MC-F). Claude E. McLean, Jr., testified that emission spectrography is not an accurate method for determining gold and silver content (Tr. 236).

Jerry Kowal, Jr., a potential investor in the property but untrained in geology or engineering (Tr. 110, 112), testified that he and one Jessie Swiger gathered samples in November 1980. According to Kowal, Swiger took the samples to Ohio (Tr. 114). An analysis, purportedly of these samples, by John T. Banks Laboratories of Pompton Lakes, New Jersey, lists values of 3.12 oz./ton for gold, and 132.94 oz./ton for silver (Exh. MC-G; Tr. 113-14). Kowal speculated that the party named on the exhibit, "J.M. Services" might be a bridge building contractor who was looking for a personal investment (Tr. 118).

Jerry Kowal, Sr., a swimming pool excavator, also took samples. The assay certificate associated with his sampling, from the Iron King Assay Office in Humboldt, Arizona, lists 12 samples ranging in values from ".004" to "1.132" for gold (Tr. 130, 134; Exh. MC-I).

Warren A. Konemann testified that he sent one sample to JDB Company and another to Gold Dome Mining Corporation, both of Phoenix, for analysis. The JDB Company assay report lists six samples ranging in values from trace to 0.052 oz./ton for gold and 0.37 to 1 oz./ton for silver (Exh. MC-M). Konemann stated that he had not estimated how much ore there might be in the ground, that core drilling would probably be necessary to make such an estimate, and that he had not projected the type of mining operation necessary to extract the ore (Tr. 167).

Gene Stowe, General Manager for Gold Dome Mining Corporation, testified that he gathered eight samples (Tr. 173). Though not an assayer, Stowe assayed four samples by fire assay and four by a "bench leach tails" process (Tr. 190; Exhs. MC-Q, MC-R). The highest value obtained by the latter process was 0.04 oz./ton for gold and 6.64 oz./ton for silver. Stowe testified that Gold Dome's method of recovery would cost $ 14 per ton but that a milling facility would have to be built near the claim (Tr. 177). According

to Stowe's cost breakdown, appellants would be left with a profit of about $ 545 per day (Tr. 178). Stowe testified that he investigated appellants' claim with a view toward acquiring it. He stated, however, that it was "not a high enough grade property for us" (Tr. 189). He said also that the property would have to be core drilled to determine how much ore was present (Tr. 190).

Depositions were taken of two witnesses for appellants who could not attend the hearing. James A. Jones, owner of Geo Tec Mining Consultants in Wickenburg, Arizona, but untrained in geology or assaying, testified that appellants' property was an interesting prospect for further exploration (Jones Deposition (Depo.) at 41, 53). During the deposition, appellant Gillette produced several metallic beads (Jones Depo.; Exhs. 3 and 4), which he had not brought to the hearing. According to Gillette, the beads were the results of processing by himself and Warren Konemann, and the product of assaying by one Ray Hoopes. Anne Jordan, a geological engineer with Geo Tec, had written to Gillette concerning the assay by Hoopes. In her letter, she stated that the assay would be of no value because Hoopes was not a certified assayer (Jones Depo.; Exh. 5). Shown the beads by Gillette, Jones at first stated that he had no way of telling whether they were "absolutely the same beads" he had seen when he watched Hoopes perform the assay. Then he testified: "I was there when the sponge was reduced, and buttons of the like size came up. And they are gold" (Jones Depo. at 18, 19).

Wayne Hammond, owner of a refining plant in Tempe, Arizona, testified that assays on ore from the claim were performed at his facility. Hammond is not a registered assayer, did not supervise the assays, was unable to offer cogent testimony on the results, and could not explain contradictory data in the assay report (Hammond Depo. at 6, 20-23; Exh. A). Hammond testified that "sizeable" tests would have to be made to determine the economic prospects of the claim (Hammond Depo. at 28).

In his decision, the Judge summarized the evidence and applicable law and concluded that the Government had presented a prima facie case of lack of discovery of valuable minerals on appellants' claim. He further found that appellants had failed to present a preponderance of evidence to overcome the Government's case. Accordingly, he declared appellants' claim void.

The validity of any mining claim is dependent upon the disclosure of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 22 (1982). A valuable mineral deposit exists if the mineral found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. United States v. Coleman, 390 U.S. 599, 602 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This "prudent person" test has been refined to require a showing that "as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed." In re Pacific Coast Molybdenum, 75 IBLA 16, 29, 90 I.D. 352,

360 (1983). However, actual successful exploitation need not be shown -- only the reasonable potential for it. Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971). The question is not whether a profitable mining operation can be demonstrated, but whether, under the circumstances and based upon the mineralization exposed, a person of ordinary prudence would expend substantial sums with the reasonable expectation that a profitable mine might be developed. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974).

[1] When the United States contests a mining claim on the basis of a lack of discovery, it bears only the burden of going forward with sufficient evidence to establish a prima facie case on the charges in the contest complaint. When a Government examiner, who has had sufficient training and experience to qualify as an expert witness, testifies that he has physically examined a claim and found mineral values insufficient to indicate the discovery of a valuable mineral deposit, the United States has established a prima facie case that the claim is not supported by a discovery. United States v. Ledford, 49 IBLA 353 (1980). Once a prima facie case is presented, the burden then shifts to the claimant and it is incumbent upon the claimant to present evidence which is sufficient to overcome the Government's case on the issues raised. United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Cactus Mines, Ltd., 79 IBLA 20 (1984); United States v. Rice, 73 IBLA 128 (1983).

Judge Rampton held that the testimony of Hilton K. Cass together with the assay results obtained from his samples established the Government's prima facie case. Appellants do not challenge this conclusion. Rather, their arguments are directed toward the Judge's analysis of the evidence they presented, an analysis which led to the Judge's conclusion that appellants had failed to carry their burden of refuting the Government's case by a preponderance of the evidence.

In their statement of reasons, appellants argue that Judge Rampton failed to give proper weight to their evidence. They review portions of the testimony of their witnesses and stress the assay results they entered into evidence. In its answer, the Government argues that the testimony and assays from appellants' unregistered assayers were properly given little weight by the Judge.

Judge Rampton found the testimony of James A. Jones to be "largely hearsay, unreliable, and speculative" (Decision at 13). As noted earlier, Jones testified with respect to an assay performed by Ray Hoopes. The Judge found that the assay had been performed by unconventional methods, that Jones was unqualified in assaying, and that he knew nothing of the qualifications of Hoopes. One of appellant's own exhibits, the Anne Jordan letter (Jones Depo.; Exh. 5), states that Hoopes was not a "certified" assayer and that his assay would be of no value to appellant Gillette. Moreover, this particular assay was vigorously disputed by Hilton K. Cass (Cass Affidavit at P6). Judge Rampton also found that the testimony of Wayne Hammond was hearsay and unreliable because he took no part in the assay process and was unable to explain discrepancies in the assay report.

With regard to the testimony of Gene Stowe concerning his assay, Judge Rampton took into account evidence that Stowe was not registered as an assayer under Arizona law, and that the Arizona Department of Mineral Resources believed his firm had "done a disservice to prospectors and defrauded them of their funds with their unrealistic assaying practices" (Decision at 12; Exh. 14). The Judge also gave more credence to the testimony of government witnesses Cass and McLean, who questioned the reliability of Stowe's assay method, than he gave to Stowe. His conclusion that the testimony of the government witnesses was more reliable was based in part on their higher professional qualifications.

Although Stowe's profit analysis for the proposed mining operation (Exh. MC-O; Statement of Reasons at 7) was not specifically discussed by Judge Rampton, we find that it, also, is of little probative worth. The mining, hauling, and milling costs assumed in the analysis are unsupported by specifics or realistic cost data. For example, a contract mining cost of $ 55.25 per ton is posited, but neither the necessary machinery nor man-hours is itemized. Nor is there any mention of other operations which might serve as comparisons. The Stowe figures are not only wholly speculative but also quite incredible, considering the absence of any estimate as to quality and quantity of an ore body.

While material, relevant hearsay is admissible in administrative proceedings (5 U.S.C. § 556(d) (1982); United States v. Arbo, 70 IBLA 244 (1983)), the trier of fact is not required to believe or give probative weight to unreliable or inherently incredible evidence. United States v. McDowell, 56 IBLA 100 (1981). We find no error in Judge Rampton's assessment of, and no error in the weight he attributed to, the reliability and credibility of testimony and evidence presented by appellants' witnesses.

[2] "Quantity" of valuable minerals is one of the elements of the discovery test. Appellants have presented virtually no evidence on this point. Appellants' witnesses testified that they did not know how much ore might be on the claim. These witnesses also testified that exploratory work would have to be performed to estimate quantities. Evidence of mineralization which may justify further exploration but not development of a mine does not establish discovery of a valuable mineral deposit. United States v. Franklin, 99 IBLA 120 (1987), and cases there cited.

[3] We have concluded that Judge Rampton correctly found appellants' evidence unreliable. However, even if one or two high values on appellants' assays were reliable and credible, appellants would fare no better because isolated showings of high gold values are not sufficient to establish a discovery where there is no evidence that such showings are part of a continuous mineralization along the course of a vein or lode such that the quantity of ore can reasonably be determined by standard geologic means. United States v. Parker, 82 IBLA 344, 368-69, 91 I.D. 271, 285-86 (1984); United States v. Wells, 69 IBLA 363 (1983); United States v. Melluzzo, 38 IBLA 214, 85 I.D. 441 (1978), aff'd, Melluzzo v. Watt, Civ. No. 81-607 (D. Ariz. Mar. 31, 1983), aff'd, Civ. No. 83-2056 (9th Cir. Oct. 3, 1983). United States v. Weekley, 86 IBLA 1 (1985).

For these reasons, appellants' documentary evidence and witness testimony, even seen in their most favorable light, are insufficient to overcome the Government's prima facie case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

Anita Vogt
Administrative Judge
Alternate Member